INDEX

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATUTES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 971

MARY DOE, *et al*, etc.,

Appellants,

v.

ARTHUR K. BOLTON, Attorney General of the State of Georgia, *et al*, etc.,

Appellees.

On Appeal from the United States District Court For the Northern District of Georgia

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MOTION TO DISMISS

The Appellees move the Court to dismiss the instant appeal herein from the judgment of the United States District Court for the Northern District of Georgia, Atlanta Division, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

(A) THE STATUTE

This appeal attempts to raise questions concerning the

validity of certain portions of Georgia's 1968 abortion law, both facially and in operation. Ga. Laws 1968, pp. 1249, 1277-1280; Criminal Code of Georgia §§ 26-1201, 1202, and 1203. These sections are set out in the Appendix to Appellant's Jurisdictional Statement, pp. 1f-4f. The portions of the cited law which figure in this appeal prescribe an orderly and careful procedure to safeguard the health and life of the woman to be aborted as well as to assure a measure of caution and deliberation before such a drastic life-destroying step is taken.

Three basic steps are provided. The pregnant woman's doctor, who is to perform the abortion, must state that in his judgment the abortion is necessary and that the woman is a resident of the State. Second, two other physicians must concur in his judgment that the abortion is necessary, based on their separate personal medical examinations of the pregnant woman. Third, the abortion is to be performed in a licensed and accredited hospital. A committee of the hospital's staff, composed of not less than three members, must approve the abortion by majority vote. Although the physician proposing to perform the abortion may not be a member of that committee, the two physicians who concurred with his judgment are not so excluded. Consequently, the statute may be interpreted as requiring the approval of only three physicians, as it may be that the two concurring physicians are the same persons who constitute the approving majority in a hospital committee. The State courts have not been asked to construe this item or, for that matter, any other portion of the abortion statute. These conditions, imposed as preliminary steps to be taken before an unborn child's life is extinguished are contained in subsection (b) of Code Section 26-1202.

(B) THE PROCEEDINGS BELOW

Appellants sought a declaratory judgment invalidating as an abridgment of constitutional rights the entire abortion law of Georgia; they also sought a broad injunction against the law's "enforcement, operation, or execution." Plaintiff-Appellants were the unidentified, assertedly pregnant "Mary Doe", certain physicians who purportedly wished to perform abortions, and nurses, social workers, ministers, family planning and abortion counseling organizations all purportedly desiring to advise pregnant women with respect to abortions. It was not alleged that they were being prosecuted or in any way threatened or acted against by any of the Defendant-Appellees, or by anyone else for that matter, with respect to the statute. Its mere existence constituted the basis of their complaint.

A three-judge court convened, heard argument, and received briefs, all primarily on the questions of facial constitutionality and their jurisdiction in the matter.

On July 31, 1970, the court issued its opinion. It concluded that the case presented a substantial constitutional question; that there was a cognizable, justiciable controversy, but only between the unidentified "Mary Doe" and Defendants; that a pregnant woman has a constitutionally-protected right to decide to abort a pregnancy; that the State cannot proscribe the reasons for abortion but may only control the quality of the decision and its manner of execution; and that the portions of the law which limited the permissible reasons for abortion were unconstitutional. Appendix to Appellants' Jurisdictional Statement, pp. 1-a to 15-a. Appellants' request for injunctive relief was denied, and the declaratory relief offered was

formalized by order and judgment on August 24, 1970. Appellants' Jurisdictional Statement, Appendix, pp. 1-b to 3-b. Subsequent to the Notices of Appeal, the court *sua sponte* modified its original opinion to state that hospital abortion committees cannot limit themselves by the adoption of the same standards which were declared unconstitutionally restrictive in the State's criminal law. It also amended its judgment to deny the motion to reconsider revocation of the guardian ad litem appointment and to deny representative intervention on behalf of the unborn child. The questions presented in this appeal are not based on the court's modification and amendment, and they are therefore basically unrelated.

II.

ARGUMENT

THE QUESTIONS ON WHICH THE DECISION OF THE CAUSE DEPENDS ARE SO UNSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

Preliminarily, it must be noted that in attempting to justify and demonstrate the substantiality of the first question proposed by Appellants, with respect to the justification for an injunction, they engraft a general discussion of the issues involved in the whole abortion problem in an effort to clothe their specific question with the substantiality inherent in this currently volatile subject. This, it is submitted, confuses the real question presented and fails to answer the question as to why the contentions raised in this appeal should be fully explored by this Court. In other words, the myriad of issues springing from changes in the states' abortion laws and from the

attitudes of the nation's population are irrelevant in terms of the issue of whether the lower court should have issued an injunction against the enforcement, operation, or execution of Georgia's abortion statute by Appellees against Appellants.

That question is a mere collateral segment of the body of concern surrounding abortion, if indeed it is a segment peculiar to that subject at all. The views of the medical profession, which itself does not establish a state's policy concerning the definition of crime, the policies of other states as implemented through their legislatures' enactments, which under no principle of our federal system may be thrust upon an unwilling, coequal State, and the actual controversies being litigated in various jurisdictions and involving dissimilar statutes have no bearing on the purported "right" to an injunction in this case.

Therefore, the magnitude of the abortion controversy, with all of its complex components and spin-off questions, does not lend weight or substance to the specific question raised here.

(A) WHETHER THE LOWER COURT SHOULD HAVE ISSUED AN INJUNCTION IS NOT A MATTER TO WHICH THIS COURT NEED DEVOTE ITS FURTHER ATTENTION.

Appellants contend that they were entitled to an injunction from the three-judge court, enjoining the "enforcement, operation or execution" of the portions of the state statute declared unconstitutional. This is based on the theory that the anti-injunction statute, 28 U.S.C. § 2283, which specifically prohibits enjoining proceedings in a state court, is not involved since no state pro-

ceedings are pending or threatened. It follows, Appellants contend, that therefore the prohibition does not apply and the court had a wider latitude in granting an injunction.

But such a view completely overlooks the nature of, and prerequisites for, an injunction. A proper analysis of this extraordinary equitable remedy will dispel the notion that a substantial federal constitutional question is involved in the district court's declination of an injunction. The denial was based on the discretionary use of the staying hand of abstention, the court stating that the vindication of the rights of "Mary Doe" should be left to the State courts. Even if the other Appellants had not been dismissed as Plaintiffs for lack of a justiciable controversy, and the denial of injunction applied also directly to them, the same result is required.

The specific prohibition of Section 2283 does not change the basic prerequisites for injunctive relief under Section 2281, nor does it alter the nature of such a remedy. Regardless of what else is required, the granting of an injunction is always within the sound discretion of the trial court. *American Federation of Labor; Metal Trades Department v. Watson,* 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946); *Government and Civic Employees Organizing Committee, CIO v. Windsor,* 116 F.Supp. 354 (N.D. Ala. 1953), *aff'd* 347 U.S. 901, 74 S.Ct. 429, 98 L.Ed. 1061 (1954); *Abbott Laboratories v. Gardner,* 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Petroleum Exploration v. Public Service Commission,* 304 U.S. 209, 58 S.Ct. 834, 82 L.Ed. 1294 (1937). It has been long recognized that injunctive relief is a transcendent or extraordinary power,

to be used sparingly and only in a clear and plain case. *Irwin v. Dixion*, 9 How. 10, 13 L.Ed. 25 (1850). Since an injunction is an extraordinary equitable remedy, an appeal from its denial must establish an abuse of discretion. *United States v. W. T. Grant Co.*, 345 U.S. 629, 633, 73 S.Ct. 894, 97 L.Ed. 1303 (1953). Appellants here have made no such allegation, nor offered any grounds to support such a finding. And as said in *Petroleum Exploration v. Public Service Commission, supra:*

> "To justify the use of the extraordinary power of a court of equity, there must be allegation and proof of threatened injury under some of the recognized sources of equitable jurisdiction."

Despite Appellants' argument, the fact that there is no pending or threatened State action against "Mary Doe" or any of the other Appellants does not open the door to injunctive relief by removing the anti-injunction impediment. Contrarily, it adds fuel to the justification of the injunction's denial. The enactment of Section 2283 did not remove or lessen the general prerequisites for injunctive relief under Section 2281.

There are two elements starkly missing from this case, the absence of which elements not only shows that the lower court's denial hints of no abuse of discretion at all, but going one step further, shows that an injunction would not have been warranted.

The first absent element is irreparable injury. As recognized in *Wells v. Hand*, 238 F.Supp. 779 (M.D. Ga. 1965), *aff'd sub nom. Wells v. Reynolds*, 382 U.S. 39, 86 S.Ct. 160, 15 L.Ed.2d 32 (1965):

> "The controlling question is whether the plaintiffs

> have made a sufficient showing that the need for equitable relief by the injunction is urgent in order to prevent great and irreparable injury. *American Federation of Labor v. Watson*, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946). The injunctive relief sought . . . must be measured by the extraordinary circumstances rule and considerations of whether the danger of irreparable loss is both great and immediate." *Id.* 238 F.Supp. at 786.

Stated another way, exceptional circumstances and a clear showing of necessity are required to interfere to prevent the enforcement of a criminal statute. *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89, 55 S.Ct. 678, 79 L.Ed. 1322 (1935).

The "irreparable injury" claimed in the instant appeal is, to say the least, conjectural and suppositious. No facts whatsoever with respect to these particular Appellants are claimed in support of the cry. One such "irreparable injury" urged is the possibility of state prosecution of "a physician". But Appellants even admit that such an eventuality would only occur "despite all reasonable expectations." Even in Appellants' view, such prosecution is only "potential". Jurisdictional Statement, p. 14. The second "irreparable injury" apparently urged is not specifically identified, although Appellants assert that a special circumstance is the short time span a pregnant woman has in which to procure an abortion. What the irreparable injury to this unidentified group of women would be, without the intervention of a general injunction in the present case, is left to assumption, as is the answer to whether the injury needs prevention by federal injunction. To warrant such intervention, the injury claimed must be "clear and imminent". *American Fed-*

eration of Labor; Metal Trades Department v. Watson, 327 U.S. 582, 66 S.Ct. 761, 90 L.Ed. 873 (1946).

What clear and imminent, great and irreparable loss to "Mary Doe", whoever she is, will result without a permanent injunction? What clear and imminent, great and irreparable loss will result to that body of pregnant women in Georgia which "Mary Doe" presumes to represent? What clear and imminent, great and irreparable loss will result to the physicians, or to the nurses, or to the ministers, or to the social workers, or to the organizations, without an injunction in the present case? The complete absence of answers to these questions in Appellants' case illustrate that an injunction would not be warranted. Far more would be needed to present to this Court for full review a substantial federal constitutional question involving the lower court's refusal of injunctive relief.[1]

Even in *Dombrowski*[2] relied upon by Appellants, the granting of injunctive relief was deemed appropriate because "the denial . . . may well result in the denial of any

[1]Appellants claim that injunctive relief would prevent multiple suits. They offer for illustration the attempted intervention in this case of "Jane Roe", and the independent suit filed by "Polly Poe." But "Jane Roe's" quarrel was with Georgia Baptist Hospital, and "Polly Poe's" suit is against Fulton-DeKalb Hospital Authority. Neither of these organizations were defendants in the instant case so that, even putting aside all other dissimilar circumstances, an injunction against the current Appellees would not enjoin those organizations unless it were shown that they were persons in active concert or participation with Appellees and received actual notice of the injunctive order. Federal Rules of Civil Procedure, 65(d); *Zenith Radio Corporation v. Hazeltine Research,* 395 U.S. 100, 112, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

[2]*Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965).

effective safeguard against the loss of protective freedoms of expression, and cannot be justified." Such is obviously not the case here.

The second failure with respect to the request for injunctive relief in this case is the total absence of any threatened or probable act which might cause irreparable injury. Without such, injunctive relief may not be granted. *Public Service Commission v. Wycoff Co.*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952). See also *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959); *Cavanaugh v. Looney*, 248 U.S. 453, 39 S.Ct. 142, 63 L.Ed. 354 (1918). Not only do Appellants admit that no State criminal prosecution is pending or threatened, they assert no pending, threatened, or probable act of any kind by any of the Appellees against any of them, much less an act that would be prohibited. As early stated by this Court, the injury must be impending and threatened, so as to be averted only by the protective preventive process of injunction, in order for it to issue. *Truly v. Wanzer*, 5 How. 141, 12 L.Ed. 88 (1847). There must be at least a threat of irreparable injury, as required by traditional doctrines of equity. *Cameron v. Johnson*, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182 (1968).

Apparently, Appellants' asserted justification for injunction is the combination of Appellees' capacities as office-holders, combined with the existence of a State criminal statute declared partially unconstitutional. Such does not warrant injunctive relief. As held in *Watson v. Buck*, 313 U.S. 387, 61 S.Ct. 962, 85 L.Ed. 1416, (1941), even a general statement that an officer stands ready to perform his duty to prosecute violators of a

criminal statute is not the equivalent of a threat that prosecutions are to be begun immediately, in such numbers, or in such manner as to indicate the virtual certainty of that extraordinary injury which alone justifies equitable suspension of proceedings in criminal courts under an invalid statute.

Much less, then, can Appellants suggest that this Court review the denial of injunction and reverse it as an abuse of discretion. In the absence of any claim that the statute is being, or will be, asserted to violate any constitutionally protected rights of the Appellants in their various capacities, it is submitted that an injunction would be completely unappropriate, so that its denial need not be reviewed.

As recognized by this Court in *Dombrowski v. Pfister, supra:*

> "It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." 380 U.S. at 484-485.

Appellants' contention is that since part of the statute was declared unconstitutional, an injunction is mandated against its enforcement, operation, or execution. Such a proposition presents no substantial federal constitutional question, because if Appellant's position were correct, an injunction against future enforcement would automatically be required in every case where a statute's constitutionality is rejected. And such is not the law. As noted in *Zwickler v. Koota,* 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967), the appropriateness and merits

of a declaratory judgment, and the propriety of issuing an injunction, are to be decided irrespective of each other.

(B) WHETHER THE REMAINING PROVISIONS OF GEORGIA'S ABORTION LAW RAISE DUE PROCESS AND EQUAL PROTECTION QUESTIONS OF FEDERAL CONSTITUTIONAL MOMENT IS PREMATURE, LACKS STATUS AS A JUSTICIABLE CONTROVERSY, AND DOES NOT LEND ITSELF FOR REVIEW AS A SUBSTANTIAL CONSTITUTIONAL QUESTION.

(1) Appellants propose that the Court examine the statute in its new posture, with the exclusion of the portions struck by the lower court. The judicial surgery undertaken by the three-judge court has left the statute in a different frame and has vastly changed the nature of the statute so that it now takes on a more health-oriented primary purpose. Such a drastic change should not, it is submitted, subject the remainder to scrutiny by this Court at the first instance. The lower court viewed the unchanged statute as an attempt to treat abortion as a medical problem. Opinion of the District Court, Appellants' Jurisdictional Statement, p. 12-a. Georgia, however, had viewed it as more than merely medical, and prescribed criminal sanctions for all but specified types of abortions.

The judicial conversion of the statute should first be opened to State examination. The legislature, which has not met since the declaratory judgment was rendered, should have an opportunity to review and possibly revise

the statute. As this Court has on numerous occasions repeated:

> "We construe a criminal statute. 'It is the legislature, not the Court, which is to define a crime, and ordain its punishment.' " *Arroyo v. United States,* 359 U.S. 419, 79 S.Ct. 864, 3 L.Ed.2d 915 (1959), citing a line of cases.

The legislature should be afforded time to adjust the remaining provisions to the policy of the State. This Court has traditionally left matters of State policy to those governments. As was said in *Building Service Employees International Union v. Gazzam,* 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, (1950):

> "The public policy of any state is to be found in its constitution, acts of the legislature, and decisions of its courts. 'Primarily, it is for the law makers to determine the public policy of the State.' *Twin City Pipe Line Co. v. Harding Glass Co.,* 283 U.S. 353, 357, 75 L.Ed. 1112, 1116, 51 S.Ct. 476, 83 ALR 1168."

The State appellate courts have not yet construed the abortion law adopted in 1968, either in its entirety or as altered in the proceedings below. The construction of State statutes is primarily the concern of State courts. Here, there has been no authoritative declaration by the State, and the State's construction could conceivably avoid any decision under the Fourteenth Amendment. Such was the case in *Reetz v. Bozanich,* 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970).

The prematurity of a substantial federal constitutional question is demonstrated by Appellants' own argument. They have construed the new law in such a way that it is favorable to their "burdensome" argument. Appellants'

construction is not authoritative nor substantiated by fact. For example, it is claimed that the pregnant woman has no right to appear before the hospital abortion committee[3]. This detail is a subject on which the statute is silent and the Appellants vociferous. A construction has not been sought from the State courts. No reason is given why the State would interpret and construe the statute contrary to constitutional requirements, nor is it contended that due process *could not* be afforded under the procedure prescribed. Appellants' objection, postulated without proof, may well be open to settlement without involving matters of constitutional magnitude. Consequently, there is no substantial federal constitutional question which compels full review by this Court presently.

(2) Even if the Court would agree that the statute is ripe for this ultimate review, the charge of vagueness and ambiguity is unsubstantial.

The lower court modified the statute so that its concern is with medical matters primarily. Appellants complain that the test is so vague and ambiguous that it violates due process. According to the statute, as modified by the court, an abortion is permitted where it is deemed necessary in the best clinical judgment of a duly licensed physician-surgeon. Taking this criterion in its context, and considering additionally that an abortion will not be performed except where two additional physician-surgeons independently come to the same conclusion of necessity, and a hospital committee approves it, it is obvious that the test is not so vague as to fail to pass constitutional muster.

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[3]Appellants' Jurisdictional Statement, p. 18.

The due process clause of the Fourteenth Amendment to the federal Constitution requires a State to frame its criminal statutes so "that those to whom they are addressed may know what standard of conduct is intended to be required." *Cline v. Frink Dairy Co.*, 274 U.S. 445, 458, 47 S.Ct. 681, 71 L.Ed. 1146 (1927). It is explicit in the statute that, before an abortion may be performed, the physician-surgeon must have concluded, upon an application of his best clinical judgment, that it is necessary. It is only the performance of an abortion without this prerequisite finding, that is proscribed. It is patent that such a test does not fail to give adequate warning of the conduct proscribed. It is patent that a doctor's finding of necessity for an operation, as judged by clinical standards in a medical frame of reference, do not fail to give adequate warning of the conduct proscribed.

This Court has recognized that lack of precision in criminal statutes is not itself offensive to the requirements of due process. In *Roth v. United States*, 354 U.S. 476, 491-492, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), *reh. den.*, 355 U.S. 852, the Court quoted from the *Petrillo* case.[4]

> "'. . . [T]he constitution does not require impossible standards'. All that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice. . . .'"
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> * * *
>
> "'. . . That there may marginal cases in which it is difficult to determine the side of the line on which a particular situation falls is not sufficient reason to

[4] *United States v. Petrillo*, 332 U.S. 1, 7, 8, 67 S.Ct. 1538, 91 L.Ed. 1877, 1883 (1947).

hold the language too ambiguous to define a criminal offense. . . .'"

(3) The claims of "Mary Doe" and the class she claims to represent with respect to purported due process and equal protection violations, present no question for review. None of the arguments are based on a concrete body of facts. The total absence of a proven set of circumstances leaves a void which prevents the subjection of nebulous propositions to the revealing light of cold, hard fact which would comprise a real case or controversy. There is no frame of reference to relate theory to. Consequently, the appeal presents only a general discussion of the pros and cons of unbridled abortion. Such a situation lacks that crystalized adverseness which would remove it from the realm of the merely hypothetical.

Moreover, the procedure for obtaining an abortion is patently defendable as an attempt to surround the irreversible decision, in which the termination of the life of another is involved, with care and caution.

(C) THE QUESTION AS TO THE "STANDING" AND "COLLISION OF INTEREST" OF APPELLANTS OTHER THAN "MARY DOE" PRESENTS NO SUBSTANTIAL FEDERAL CONSTITUTIONAL QUESTIONS FOR REVIEW.

Appellants, physicians, nurses, social workers, ministers, and counselling organizations question the lower court's conclusion that their challenge to the statute lacked the requisite justiciability. The Court was right. There is no assertion of dispute between any of the Appellants and any of the Appellees, except with respect to their opinions concerning the statute. No adverse rela-

tionship was asserted. Since the availability of declaratory relief depends on whether there is a "live dispute between the parties", and this is absent in the current case, nothing remains for this Court to review. *Powell v. McCormick*, 395 U.S. 486, 517-518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). As held by this Court in *Maryland Casualty Co. v. Pacific Coal and Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826, 828 (1941):

> "[There must be] a substantial controversy between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Appellants claim a "personal stake" by virtue of the conspiracy and the aiding and abetting statutes. Yet they point to no case in Georgia under either the old Georgia abortion statute or the presently-challenged one, illustrating a possibility of prosecution for conspiring to perform an abortion or for aiding or abetting in its performance by counselling or otherwise. The "collision of interest" is consequently merely conjectural.

Moreover, the question of the dismissed Plaintiffs' standing is not of great importance since the lack of a justiciable controversy as to them did not prevent the court from issuing a declaratory judgment favoring their contentions.

CONCLUSION

WHEREFORE, Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees move the Court to dismiss the appeal from the United States District for the Northern District of Georgia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marion O. Gordon, Attorney of Record for one of the Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I served the foregoing Motion to Dismiss on the Appellants by depositing copies of the same in a United States mailbox, with first class postage prepaid, addressed to counsel of record at their post office addresses:

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